

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

THE ATLANTA OPERA, INC.

Employer

and

Case 10-RC-276292

**MAKE-UP ARTISTS AND HAIR STYLISTS
UNION, LOCAL 798, IATSE**

Petitioner

DECISION AND DIRECTION OF ELECTION¹

Petitioner Make-Up Artists and Hair Stylists Union, Local 798, IATSE, seeks to represent a bargaining unit of makeup artists and hairstylists employed by The Atlanta Opera, Inc. (TAO).² TAO maintains that all of the petitioned-for makeup artists and hairstylists are independent contractors who are, therefore, not employees within the meaning of Section 2(3) of the Act, while the Petitioner maintains that they are statutory employees.

Should I find that the makeup artists and hairstylists are statutory employees, the Petitioner seeks a mail ballot election, while TAO prefers a manual election.

A hearing officer of the National Labor Relations Board conducted the hearing in this matter via videoconference on May 18, 2021 and May 19, 2021.³

¹ The Petitioner filed this petition under Section 9(c) of the Act. I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I make the following preliminary findings: the hearing officer's rulings are free from prejudicial error and are affirmed; TAO is an employer engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain employees of TAO. The parties were given the opportunity to file briefs, and both parties did so.

² The Petitioner estimates that there are approximately 16 individuals in the petitioned-for unit. TAO takes the position that there are only five individuals in the petitioned-for unit. The petition characterizes the petitioned-for individuals as "makeup artists and hairstylists." Throughout the record these individuals are also known as "wig and makeup artists," "wig and makeup workers," "the wig and makeup crew," or simply "stylists." Throughout this document, the terms may be used interchangeably. One petitioned-for individual most recently held two positions simultaneously: "wig and makeup designer" and "wig and makeup department head."

³ See *Morrison Healthcare*, 369 NLRB No. 76 (2020). The ongoing global Covid-19 pandemic constitutes extraordinary circumstances necessitating the Region to conduct the hearing by videoconference technology.

I find that TAO has not met its burden of establishing that the makeup artists and hair stylists are independent contractors. Additionally, I find that a mail ballot election is appropriate because it is currently TAO's off-season, and the potential voters are presently engaged elsewhere, making it unlikely that they will be able to gather together at a designated time and place in order to vote.

The eligibility of one individual, Frandresha "Brie" Hall, has not been resolved. Ms. Hall shall be permitted to vote subject to challenge.

FACTS

TAO's Structure and Business

For approximately 42 years, the Atlanta Opera has planned and presented operatic performances for the public.

Tomer Zvulun is TAO's general and artistic director. Zvulun is charged with artistic quality and planning as well as managerial duties.⁴ He reports to TAO's Board of Directors. Zvulun's direct reports include a managing director, Michah Fortson; a chief of marketing and audience development; a chief advancement officer, who handles issues related to revenue and patrons; a director of finance; a director of production, Kevin Mynatt; and an artistic administrator.

TAO asserts that it employs a total of 32 full-time staff,⁵ including members of senior management, as well as 16 seasonal employees, including company players and studio artists.

TAO presently has a collective-bargaining relationship with two International Alliance of Theatrical Stage Employees (IATSE) locals. IATSE Local 927 represents stagehands, including electricians, carpenters, and prop handlers. IATSE Local 859 represents dressers, who help performers change into and out of elaborate costumes. Additionally, the American Federation of Musicians (AFM) represents the musicians who comprise TAO's orchestra. The 48 "core members" of the orchestra are employees of TAO; the stagehands and dressers are not. A payroll company manages payment of stagehands and dressers, who are referred to TAO by IATSE on an as-needed basis.⁶

TAO's main stage is the John Williams Theater at the Cobb Energy Performing Arts Center located in northwest Atlanta. TAO also performs smaller operas in various venues. TAO usually

⁴ Additionally, Zvulun sometimes acts as director of a specific production pursuant to a separate contract.

⁵ Eight of these positions are presently vacant.

⁶ Michah Fortson testified that the stagehands are employed by the payroll company. The collective-bargaining agreement suggests that TAO employs the stagehands.

offers four performances of four productions on its main stage each season in addition to four to eight performances of two smaller operas. A season runs from autumn to spring. Most recently, in April and May 2021, TAO presented *Threepenny Opera* and *Threepenny Carmen*. Due to the Covid-19 pandemic, TAO presented *Threepenny Opera* and *Threepenny Carmen* in a tent outdoors rather than on its usual stage. TAO does not own any of the venues at which its operas are presented.

Typically, TAO spends several years planning each opera. A presentation generally requires contributions from 40 to 90 orchestra members; carpenters and electricians who work with scenery and lighting; choristers, soloists, actors, and other performers; stage managers; dressers; and makeup artists.

Planning of a particular opera begins in earnest when TAO selects a director who coordinates the artistic vision of the production. The director generally chooses a design team, which may be comprised of lighting designers, a costume designer, a set designer, a sound designer, a wig designer, and/or a makeup designer. TAO asserts that while the *planning* of each opera is handled by TAO employees, the *production* of each opera is handled exclusively by independent contractors not employed by TAO.

Wig and Makeup Designer / Wig and Makeup Department Head

For its most recent productions, TAO has engaged Frandresha “Brie” Hall as both its Wig and Makeup Department Head and its Wig and Makeup Designer. The two positions are not usually combined. A Wig and Makeup Designer is part of the creative team and works closely with the costume designer and the lighting designer to help implement the director’s vision of an opera. A Wig and Makeup Department Head seeks out other qualified wig and makeup artists to execute that design on a nightly basis.⁷

Hall is the only member of the petitioned-for unit who has signed independent contractor agreements with TAO. She signed separate independent contractor agreements for her work as Wig and Makeup Department Head and her work as Wig and Makeup Designer. For her work as Wig and Makeup Designer on *Threepenny Opera* and *Threepenny Carmen*, Hall received a flat fee of \$8,000, paid in two installments, \$1,000 upon signing and \$7,000 upon final dress. For her work as Wig and Makeup Department Head for those same productions, she received an hourly wage and was eligible for overtime. The agreements read in part:

The parties acknowledge that the Services being performed are outside the usual course of the business of the Company and Contractor is customarily engaged in the independently established business of the same nature as the Services being performed under this Agreement.

⁷ TAO takes the position that Hall is a statutory supervisor while the Petitioner takes the position that she is not. That matter has not been litigated; accordingly, she shall be permitted to vote subject to challenge.

Director of Productions Kevin Mynatt creates a budget, including a wig and makeup budget, for each production. Mynatt discusses the budget and the design of the show with the Wig and Makeup Designer, most recently Hall. Wig designers often pull wigs from their own stocks for use in productions. Hall does not have a stock of wigs; thus, TAO rents wigs from Hall's contacts within the industry.

Work Conditions of Makeup Artists and Hairstylists

In her role as Wig and Makeup Department Head, Hall chooses wig and makeup artists as needed for a production. These wig and makeup artists do not work pursuant to a written contract.⁸ Rather, they orally agree to an hourly pay rate with Hall and fill out timesheets accordingly. Not all wig and makeup artists receive the same payrate.⁹ TAO cannot control whether a particular makeup artist or hairstylist is available for any given production.

Fortson testified that if a makeup artist or hairstylist is unable or unwilling to work during a particular performance, Hall seeks out a replacement. Hall testified that she notifies TAO of such occurrences before seeking a replacement. Stylist Irenia Vail testified that wig and makeup artists only decline to work a particular performance in the event of an emergency; they commit to the schedule before the production opens. On occasion, a wig and makeup artist advises Hall of a conflict before the production opens, but if there are multiple conflicts, the wig and makeup artist does not work during the course of the production. Wig and makeup artists cannot find their own substitutes if they do not wish to work on a particular date.

Hall signs the wig and makeup artists' timesheets. Hall also assigns work to each wig and makeup artist (such as assigning each to a character) and schedules them accordingly. The overall schedule is determined by TAO's rehearsal and performance schedule.

Three stylists testified that they regularly share one another's workloads. For example, if one stylist is running behind schedule, a second stylist running ahead of schedule may help by fetching materials. Multiple witnesses further testified that all wig and makeup artists wait until the last one has completed his or her work before leaving the premises. During this time, they prepare for the next show, particularly where, as with *Threepenny Opera* and *Threepenny Carmen*, different shows are performed on alternate nights. Director Mynatt sometimes walks around after a show telling stylists that it is nearly time to leave or asking them how long it will take to complete their work.

⁸ However, when Hall worked as a crew member in the 2018-2019 season, she signed an "Employment Agreement" with TAO. The agreement stated, "TAO wishes to employ Hall as its Wig & Make-Up Crew on the terms and conditions hereinafter set forth," and "Hall is willing to accept such employment."

⁹ Performers often tip wig and makeup artists and/or retain the services of wig and makeup artists directly, such as for a photoshoot.

TAO provides no information or orientation to wig and makeup artists. TAO requires all wig and makeup artists to supply a W-9. At least one wig and makeup artist works as a limited liability company (LLC).¹⁰ TAO does not deduct FICA or withhold taxes from wig and makeup artists' pay. TAO keeps financial records regarding the work of wig and makeup artists, but it does not keep any other sort of record of wig and makeup artists. TAO does not provide benefits to wig and makeup artists.

None of the wig and makeup artists, including Hall, are on TAO's payroll. Rather, they are designated as vendors. TAO carries a workers' compensation policy for vendors; this policy is separate from the workers' compensation policy TAO uses for those designated as employees.

TAO has never had cause to discipline or terminate a wig and makeup artist.

With the exception of infectious disease policies, wig and makeup artists are not subject to TAO's rules and regulations. They do not wear TAO uniforms, although on at least one occasion they were provided with black TAO shirts to comply with an all-black dress code. During the Covid-19 pandemic, wig and makeup artists received TAO work badges as part of a safety initiative.

Work Performed by Makeup Artists and Hairstylists

Makeup artists working at TAO must have a specific knowledge of how to apply makeup to performers' faces using colors that will not be drowned out by the theatre lighting. Incorrect color choices may leave the performers looking pale or sallow. Makeup needs to be slightly exaggerated so as to be visible by the audience who may be seated 100 feet away from the stage.

Hairstylists may be required to recreate a hair style from a particular time period. Sometimes hairstylists work with performers' own hair; sometimes they use wigs.

Hairstylists (but not makeup artists) must be certified in Georgia. Some of the wig and makeup artists take continuing education classes to continue to hone their craft; all wig and makeup artists are able to monetize their skills elsewhere in the industry, including by working in film and for private clients. Managing Director Fortson testified that the stylists work at a high level, although "not the highest."

The time commitment required of wig and makeup artists varies within a given production as well as between productions. A simple "look" using a performer's natural hair and basic stage makeup may require only ten minutes. A specialty "look" involving a prosthesis or special effects may take upwards of ninety minutes. Additionally, a hairstylist or makeup artist may be assigned to a particular character who does not need to appear on stage until Act III of a production; thus, that individual may arrive to work later than a makeup artist assigned to work with a character who appears in the opera's opening moments.

¹⁰ Venus Fears testified that she operates as Coiffure Etc., LLC, only because TAO provided her with a W-9, although she would prefer to be paid as a W-2 employee.

When TAO's performances take place on its home stage, stylists work in a designated wig and makeup room located on the backstage hallway at the John Williams Theatre. Wig and makeup artists set up their chairs in this space, and performers come to the room to have their hair and makeup done. During Covid-19, performers prepared in individual trailers, and wig and makeup artists visited those trailers to do their work.

Wig and makeup artists often coordinate with the wardrobe department. Hall testified that, for example, long hair might not work with a particular costume or a wig might need to fit under a particular hat. Wig and makeup artists also coordinate with the audio department to place microphones on performers.

Many performers do their own makeup and hair, although it is difficult to don a wig unaided. Wig and makeup artists are frequently reserved for soloists. Managing Director Fortson testified that makeup artists and hairstylists are not strictly necessary for the production of an opera, although they do improve the presentation. There is no record evidence to indicated that TAO has ever staged an opera without contributions from makeup artists and hairstylists.

Managing Director Fortson testified that no one supervises Hall when she is working for TAO because none of TAO's permanent staff possesses the skills or knowledge to do so. Likewise, Hall alone oversees the work of the other wig and makeup artists.

However, stylists Irenia Vail and Donaldo Taylor testified that wig and makeup artists receive "notes" from TAO staff. For example, a director recently wanted a black-haired dancer to be blond, thus requiring a wig. Vail and Taylor also testified that TAO staffers have asked for performers' hair to be shorter or longer; for ponytails to be higher or lower; and for eyeliner and blush to be darker. Hall testified that at preproduction meetings, Artistic Director Zvulun has instructed her to change hair and makeup to match his artistic vision. For example, Zvulun advised her that a character's "look" was "too clowny" and should be "more dystopian." Zvulun also wished for other characters to have more makeup, less makeup, or red nail polish.

A September 2020 "rehearsal report" signed by the stage manager and assistant stage manager directs, among other things, that "Canio has been staged to apply white, powder foundation and lipstick onstage, a vista. May we please have a make-up kit with these items for him to work with in rehearsals?" Hall testified that Zvulun told her to purchase white makeup that would look more opaque and less chalky. When Hall purchases a product on behalf of TAO, she either uses TAO's petty cash or uses her own funds and requests reimbursement from TAO.

TAO asserts that the stage manager and assistant stage manager are independent contractors.¹¹ TAO also argues that when Zvulun gives notes to the wig and makeup department, he does so not as the artistic director in TAO's employ but as an independent contractor who is

¹¹ However, the record reveals insufficient evidence to reach a legal conclusion that the stage managers are independent contractors. The stage managers have TAO email addresses and appear on TAO's website as representatives of TAO.

contracted to direct a particular opera. However, Zvulun sometimes attends production meetings even when he is not the director of the opera in question.

Fortson testified that wig and makeup artists provide their own tools, while four stylists testified that all necessary tools are provided, and they bring their own tools only when they prefer to do so. For example, Vail prefers to use her own curling iron even though curling irons are made available for her use when she is working on a TAO opera. TAO generally provides the makeup itself, although some performers prefer to provide their own makeup. In the event that prosthetics are required, they are provided by TAO. TAO also provides wig clamps, wig heads, pins, brushes, hairspray, gel, shampoo, conditioner, sponges, blocking ribbons, “blood” for special effects, and makeup remover.

Between April 2019 and May 2021, 23 stylists worked during seven TAO “production periods.” Brie Hall worked all seven productions; one stylist worked six productions; two stylists worked five productions; two stylists worked three productions; and four stylists worked two productions. The other stylists worked during only one production. Some stylists also performed work in production periods prior to the seven most recent; Hall testified that she first worked for TAO in 2016. However, TAO makes no commitment to rehire stylists it has previously used during future production periods.

Method of Election

TAO has proposed an election date of Friday, June 25th, 2021, from 10:00 a.m. to 12:00 p.m. As the summer is TAO’s “off-season,” no potential voters are scheduled to work on TAO’s productions on that day, or indeed on any other day or at any other time.

The potential voters generally work multiple jobs in various parts of the makeup industry. For example, some work in the film industry while others are involved with personal styling. Multiple wig and makeup artists who worked on TAO’s most recent productions testified that their work schedules, which involve multiple employers and clients, are too unpredictable to guarantee that they will be available at a particular time on a day during which they are not working at TAO.

ANALYSIS

Independent Contractor Status

Section 2(3) of the Act provides that the term “employee” shall not include “any individual having the status of independent contractor.” The party asserting that an individual is an independent contractor bears the burden of establishing that status. See, for example, *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 2 (2015).

In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test set forth in the Restatement (Second) of Agency, §220 (1958), which includes the following non-exhaustive factors to be examined:

- 1) The extent of control which, by agreement, the master may exercise over the details of the work.
- 2) Whether the individual is engaged in a distinct occupation or work.
- 3) The kind of occupation, with reference to whether, in the locality in question, the work is usually done under the direction of the employer or by a specialist without supervision.
- 4) The skill required in the particular occupation.
- 5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- 6) The length of time for which the person is employed.
- 7) The method of payment, whether by the time or by the job.
- 8) Whether or not the work in question is part of the regular business of the employer.
- 9) Whether or not the parties believe they are creating the relation of master and servant.
- 10) Whether the principal is or is not in the business.¹²

In addition to the factors set forth in the Restatement, the Board evaluates whether the evidence tends to show whether the putative independent contractor is, in fact, rendering services as part of an independent business.¹³ Thus, the Board assesses whether putative contractors have “significant entrepreneurial opportunity for gain or loss,” including assessment of whether they have the ability to work for other companies or have a proprietary interest in their work. No single factor is controlling in making the determination.

In evaluating the factors, I note the following:

- The extent of control which, by agreement, the master may exercise over the details of the work; and whether the work is usually done under the direction of the employer or by a specialist without supervision

The wig and makeup artists have no control over TAO’s rehearsal and performance schedule; they work exclusively at times and in places designated by TAO. Additionally, wig and makeup artists have no control over the artistic decisions which underlie their work. Rather, they receive notes specifying each detail of what they must do, including the amount of eyeliner and

¹² See, for example, *FedEx Home Delivery*, 361 NLRB 610, 611 (2014).

¹³ *Id.*, slip op. at 1-2.

the color of nail polish to be applied. The stylists do generally implement these instructions unsupervised, as it would not be practical for TAO's management team to watch multiple stylists prepare multiple performers in the waning moments before the performers take the stage. Additionally, TAO's management team does not possess the technical knowledge needed to implement the artistic vision; they may determine that a certain performer's makeup *should* look white from a great distance, but not how to choose and apply makeup that *will* look white from a great distance.

TAO argues that the detailed instructions received by the stylists originate not with TAO but with independent contractors. That is, when Tomer Zvulun gives very specific instructions to the Wig and Makeup Department, he does so not as TAO's general and artistic director, but as an independent contractor overseeing a particular presentation. Likewise, TAO argues that the stage managers who direct the Wig and Makeup Department to use particular makeup are themselves independent contractors. However, there is insufficient evidence to establish that the stage managers, who appear to be presented as TAO's agents on TAO's website, are themselves independent contractors. Zvulun at all times acts as an agent of TAO and carries the authority of TAO with him. Thus, I find that the directions received by the stylists to implement particular styles constitute TAO control over the details of the stylists' work. The Board has held that such control is indicative of employee status.

In *Musicians (Royal Palm Theater)*, 275 NLRB 677, 681-682 (1985), the Board adopted the ALJ's finding that the theater's music director's selection of the number and type of instruments to be used, the time and place for the session, and the music to be played; his direction of every note played by the musicians; his demonstration of how the music was to be played; his decision regarding the time necessary for rehearsal before the actual recording and the necessity for additional time; his decision regarding seating arrangements of the musicians; and his decisions regarding the time when breaks were to be taken, all established that the musicians were employees rather than independent contractors. The musicians were subject to his complete discretion and artistic interpretation and taste, and these factors established that he had complete control not only over the recording to be produced, but the manner and means by which it would be produced.

Likewise, in *The Chamber Orchestra of Philadelphia*,¹⁴ the Board denied review of the Regional Director's finding that chamber orchestra musicians were statutory employees rather than independent contractors. There, the Regional Director relied on the fact that the employer retained the right to control the manner and means by which the performance of music was accomplished. In this regard, the employer controlled where, when, and how long each of its musicians would rehearse and perform during the season. The employer decided what music would be played, which musicians would perform it, and which musicians would serve as principal players. The employer set rules as to the length of rehearsals and the musicians' timeliness and appearance.

¹⁴ Regional Director's Decision and Direction of Election, Case 4-RC-21019, issued June 9, 2005. I take administrative notice that, on July 6, 2005, the Board denied review of the Regional Director's Decision.

In *Musical Artists (National Symphony Orchestra Ass'n)*, 157 NLRB 735, 741 (1966), the Board held that dancers are independent contractors, but noted that employee status was supported by the fact that employer designated the dates and hours when rehearsals and performances were to take place.

I find that these factors support a finding that the stylists are employees due to the extent to which TAO controls the details' of the stylists' work.

- Whether the individual is engaged in a distinct occupation or work.

The Board has held that this factor refers to whether the employees at issue clearly identify themselves as working for the employer. *Sisters' Camelot*, supra, slip op. at 3 (2015). The wig and makeup workers do not wear a TAO uniform, but on at least one occasion they were provided with TAO pull-over shirts that they could wear at work to satisfy the all-black dress code. They have also been provided with TAO badges, although those badges appear to have been provided as part of a safety policy unique to the Covid-19 pandemic. The wig and makeup artists sometimes attend TAO meetings and may work closely with the sound team, the wardrobe team, or the creative team. Finally, TAO carries workers' compensation insurance for the wig and makeup artists; the Board has held that this is indicative of employee status, *Minnesota Timberwolves*, 365 NLRB No. 124 (2017).

I find that this factor is inconclusive.

- The skill required in the particular occupation.

All wig and makeup artists performing work on TAO's presentations possess a particular set of skills. They must be able to apply makeup appropriate for stage lighting and a performer's skin tone while honoring the artistic vision TAO wishes to put forth. Hair stylists (but not makeup artists) must be certified in Georgia. Some of the wig and makeup artists take continuing education classes to continue to hone their craft; all wig and makeup artists are able to monetize their skills elsewhere in the industry, including by working in film and for private clients. Managing Director Fortson testified that the stylists work at a high level, although "not the highest."

It is undisputed that the members of the petitioned-for unit have a unique skillset which cannot be replicated by TAO employees who are not specialists. However, the Board has noted that many employees covered by the Act are highly skilled in their respective fields. *Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017); *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011).

I find that this factor is inconclusive.

- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

TAO argues that because it does not own the facilities at which its operas are staged, it does not provide a place of work for the wig and makeup artists. However, it is undisputed that the wig and makeup artists do not provide their own work locations and cannot choose their own work locations.

While stylists may choose to work with their own tools, such as when a stylist prefers the functionality of a particular curling iron, the majority of hair and makeup materials are provided by TAO. TAO rents wigs on an as-needed basis. Brie Hall is sometimes instructed to purchase particular makeup and is reimbursed for that purchase by TAO. TAO also provides wig clamps, wig heads, pins, brushes, hairspray, gel, shampoo, conditioner, sponges, blocking ribbons, “blood” for special effects, and makeup remover.

I find that this factor supports a finding that the stylists are employees.

- The length of time for which the person is employed.

Each wig and makeup artist agrees to work on TAO’s operas on a show-by-show basis. Some stylists return to work with TAO many times over a period of years. Brie Hall, for example, has worked during each of TAO’s most recent seven production periods and testified that she first worked for TAO in 2016. Nine other stylists worked on between two and six of TAO’s seven productions over the past two years. Ten stylists worked during only one of TAO’s operas during this time period.

I find that this factor is inconclusive.

- The method of payment, whether by the time or by the job.

The makeup and hairstylists are paid an hourly wage and are eligible for overtime. Payment on an hourly basis weighs heavily in favor of employee status, *CSS Healthcare Servs.*, 355 NLRB 33, 39 (2010).

TAO does not make payroll deductions; the wig and makeup artists pay their own social security and other taxes. This does not necessarily weigh in favor of independent contractor status, *Miller Road Dairy*, 135 NLRB 217, 220 (1962).

In contrast, TAO pays its fulltime staff a salary or an hourly rate as well as benefits such as health insurance, a 401(k), holidays, and vacation time.

I find that this factor weighs in favor of employee status.

- Whether or not the work in question is part of the regular business of the employer and whether the principal is or is not in the business.

TAO argues that while it is in the business of presenting operas, the members of the petitioned-for unit are in the business of styling hair and makeup. While the record includes

testimony that an opera's performers technically need not wear makeup or wigs, the record includes no evidence that such a performance has ever taken place. Rather, when stylists are unavailable, the performers do their own hair and makeup.

The Board has held that where members of the petitioned-for unit perform work that is an integral part of an employer's final project, the workers and the employer are in the same business. See, *Minnesota Timberwolves Basketball*, 365 NLRB No. 124 (2017) (basketball team is in the same business as the crew members who create video content for above-court in-game display); *BKN, Inc.*, 333 NLRB 143 (2001) (script writers' work is part of television production company's normal operations).

I find that this factor weighs in favor of employee status.

- Whether or not the parties believe they are creating the relation of master and servant.

The majority of the makeup artists and hair stylists do not sign contracts indicating that they are operating as independent contractors. Multiple stylists testified that they believed that they were hired as employees of TAO but conceded that they had never been told that they were employees of TAO.

Brie Hall, the department head, did sign an independent contractor agreement. Given that no one factor is dispositive, the fact that the written agreement defines the relationship as one of "independent contractor" does not control. *National Freight, Inc.*, 153 NLRB 1536, 1358-1359 (1965); *Big East Conference*, 282 NLRB 335, 345 (1986).

Hall testified that she did not believe she could obtain the position without signing the agreement. The Board has held that an employer's ability to unilaterally draft, promulgate, and change the terms of agreements with purported independent contractors "weigh[s] heavily in favor of employee status." See *FedEx Home Delivery*, supra at 621, fn. 41, citing *Stamford Taxi Inc.*, 332 NLRB 1372, 1373 (2000).

TAO did not believe that it was creating the relation of master and servant, particularly because it requested W-9 forms from the stylists rather than treating them as W-2 employees.

I find that this factor is inconclusive.

- Entrepreneurial opportunity for gain or loss.

The record revealed no evidence that makeup artists and hairstylists have any opportunity for entrepreneurial gain or loss while working on TAO's operas. Their hourly wages are fixed; they cannot choose to work more or fewer hours. The success of the opera as a whole, or the wigs and makeup in particular, does not alter the compensation received by makeup artists and hairstylists. The makeup artists and hairstylists do not receive compensation based upon attendance, box office receipts, or critical acclaim.

TAO notes that makeup artists and hairstylists may find additional work through their work at TAO. For example, a performer may appreciate a stylist's work and hire that stylist on a private basis. However, there is no indication that such networking is different from that which occurs throughout the industry regardless of whether the stylists are employees or independent contractors. When determining whether individuals have an opportunity for entrepreneurial gain or loss, the Board evaluates whether they can increase their compensation from the employer through their work for the employer. *BKN*, supra.

TAO further notes that some stylists operate as LLCs. This does not suggest entrepreneurial opportunities; rather, one stylist testified to operating as an LLC only because of the method in which TAO offers compensation.

I find that this factor weighs in factor of employee status.

Weighing all of the above factors, I conclude that TAO has not carried its burden of proving the independent contractor status of its wig and makeup artists. I acknowledge that there is some evidence which supports a finding that the wig and makeup artists are independent contractors. TAO provides no training for its wig and makeup artists. TAO maintains no employee handbook or work rules (other than safety rules specific to the Covid-19 pandemic), nor does it maintain a disciplinary policy or discipline the wig and makeup artists. TAO provides no fringe benefits to its stylists, nor does it withhold taxes from their pay.

However, the Board has rejected the notion that any one factor predominates in its independent-contractor analysis. Rather, all factors must be assessed and weighed, no one factor is decisive, other relevant factors may be considered, and the weight to be given a particular factor depends on the factual circumstance of each case. *FedEx Delivery*, supra at 611. Viewed in its entirety, the record establishes that TAO's wig and makeup artists are statutory employees. They do not choose when or where they will work. They have little independent authority over the smallest details of their work. They do not generally supply their own equipment or tools. Their work is part of the regular business of TAO. There is no evidence that the crew members are rendering services to TAO as independent businesses, as they enjoy no entrepreneurial opportunity and take on no risk as a result of their work for TAO.

TAO relies in part upon *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004), in arguing that the wig and makeup artists are independent contractors. In that case, the Board found that models who posed for art classes were independent contractors. The Board panel majority relied on the facts that the models could choose the classes before which they would model, that they were paid by the class and not by the hour, that they supplied their own robes, and that they could work for other schools or independent artists. The Board also noted the high degree of skill of the models in striking and holding a pose – while the Academy set a general requirement for a pose, the particular manner of fulfilling that requirement was left to the discretion of the model.

I find that this case is distinguishable from *Pennsylvania Academy* for several reasons. First, the models in *Pennsylvania Academy* had the absolute ability to choose which dates they would work prior to the beginning of the semester; hours worked varied from fewer than two hours to several hundred hours. The stylists at issue here may give notice before TAO's production period begins that they are unavailable on a certain date, but in general they are expected to work the full predetermined schedule except in the event of an emergency. They certainly lack the ability to choose to work hundreds of hours, a few hours, or any number of hours in between. Additionally, the models were paid by the class while the stylists are paid hourly. The models enjoyed a level of control over their earnings and schedule that is not present here. Further, the models had considerably more independence in determining how to execute a pose than the stylists have in determining how to execute a "look." The specific form of a pose, including wardrobe, was left to the models' discretion, so long as they met a general requirement such as "leaning on one hip." The stylists, by contrast, have essentially no discretion; everything from hair color to amount of eyeliner is determined for them. Finally, the models, unlike the stylists, were responsible for providing vital equipment, including robes.

Method of Election

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board reviewed the circumstances under which it may be appropriate to direct a mail ballot election. Because of the value of having a Board agent present at an election, the Board's longstanding policy has been that, as a general rule, representation elections should be conducted manually. Recognizing, however, that there are some circumstances that would make it difficult for eligible employees to vote in a manual election, the Board has invested Regional Directors with broad discretion to determine the method by which elections shall be conducted. Under the guidelines set forth in *San Diego Gas*, a mail ballot election may be appropriate where eligible voters are "scattered" because of their job duties in terms of geography and/or varied work schedules, so that all employees cannot be present at a common location at common times to vote manually. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

I find that a mail ballot election is appropriate here. TAO operates seasonally and is currently in its off-season. Each potential voter who testified at the hearing indicated that he or she works for other employers during TAO's off-season. There is no reasonable expectation that the voters can arrange their schedules to be present at TAO's premises at any given time weeks before they may be asked to perform work for TAO. See, for example, *Shepard Convention Service, Inc.*, 314 NLRB 689 (1994) (mail ballot appropriate for "on-call" employees where a number of the employees may have other employment that may restrict their ability to reach the polls).¹⁵

¹⁵ I note that in recent months, many mail ballot elections have been directed pursuant to *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020). While the particular situations delineated by the Board in that case are not present here, the continued safety of all election participants during the Covid-19 pandemic remains a priority.

Eligibility Formula

TAO takes the position that the only eligible voters should be those who were on the payroll as of April 23, 2021, the last payday prior to the petition being filed, pursuant to the formula laid out by the Board in *Davison-Paxon*, 185 NLRB 21 (1970), for voting. TAO argues that this eligibility formula is appropriate because wig and makeup artists enjoy no expectation of recall.

The Petitioner, meanwhile, contends that formula described by the Board in *Juilliard School*, 208 NLRB 153 (1974), is more appropriate under the circumstances because the Juilliard formula recognizes that in the entertainment industry, employees are often hired on a production-by-production basis.

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks to permit optimum employee enfranchisement and free choice, without enfranchising individuals who have no real continuing interest in the terms and conditions of employment offered by the employer. *Trump Taj Mahal Casino Resort*, 306 NLRB 660 (1999). The Board's most widely used formula for voting eligibility for part-time or on-call employees is the *Davison-Paxon* formula, under which an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages four or more hours of work per week for the last quarter prior to the eligibility date. *Steppenwolf Theater Co.*, 342 NLRB 69 (2004).

In the entertainment industry, where employees are often hired to help out on a day-by-day basis or production-by-production basis, the Board has sometimes held that the irregular patterns of employment present a special circumstance warranting deviation from the *Davison-Paxon* formula. See, e.g., *Medion, Inc.*, 200 NLRB 1013 (1972) (employees eligible who worked two productions for five days over one year); *American Zoetrope Productions*, 207 NLRB 621 (1973) (two productions during the past year); *Juilliard School* (two productions for a total of five days over one year or at least 15 days over a two-year period); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999) (two productions for a minimum of five working days in the last year or at least 15 working days in the last year).

In determining whether a deviation from *Davison-Paxon* is warranted, the critical consideration is the employment pattern resulting from the number and length of the employer's stage productions. The Board also considers the degree to which the employer relies on permanent staff versus per diem employees to perform the majority of its work. *Steppenwolf Theater Co.*, supra, 342 NLRB at 71-72. In *Juilliard School*, the Board found that special circumstances existed where the employer staged relatively few events each year, which ran for three or four performances at the most, and relied almost exclusively on per diem employees. Applying that standard in other cases involving theaters and orchestras, the Board has sometimes rejected application of the *Juilliard* standard, finding no special circumstances that warranted deviation from the standard *Davison-Paxon* formula. See, e.g. *Steppenwolf Theater Co.*, supra, (employer mounts 14 productions a season, totaling some 500 performances over the course of 48 to 50 weeks a year, productions typically run five to eight performances a week for up to eight weeks, and a substantial majority of the work is performed by permanent, full-time staff members); *Wadsworth*

Theatre Management, 349 NLRB 122 (2007) (employer put on at least four productions in 2006, with performances running for approximately four weeks each, two weekly movies series for 10 weeks each, plus other events on a year-round basis); *Columbus Symphony Orchestra*, 350 NLRB 523 (2007) (employer operates with a year-round 46-week schedule of performances and presented more than 170 performances in 2006, and its full-time staff perform the vast majority of the production work).

I find that a deviation from the *Davison-Paxon* formula is warranted by the unusual employment pattern in this case. TAO has no permanent wig and makeup artists and relies exclusively on those who work on a show-by-show basis. TAO operates seasonally and is currently in its off-season. Thus, an alternative eligibility formula is necessary.

Therefore, pursuant to the *Juilliard School* formula, wig and makeup artists who have been employed by TAO in at least two productions for a total of five days over one year or at least 15 days over a two-year period shall be eligible to vote.

Conclusion

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All makeup artists and hairstylists (wig artists) employed by The Atlanta Opera; but excluding all other employees, clerical workers, managers, guards, and supervisors as defined by the Act.

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above.

Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Make-Up Artists and Hair Stylists Union, Local 798, IATSE.

Those makeup artists and hairstylists (wig artists) who have been employed by TAO in at least two productions for a total of five days over one year or at least 15 days over a two-year period shall be eligible to vote.

The eligibility of one employee, Frandresha “Brie” Hall, has not been resolved. Ms. Hall shall be permitted to vote subject to challenge.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **July 1, 2021**, ballots will be mailed to voters by the National Labor Relations Board, Region 10. Voters must sign the outside

of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 10 office by close of business on **July 22, 2021**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by July 9, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 10 Office at 404-331-2896 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

A Board agent from the Region will count the ballots at **10:00am on July 23, 2021**. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, Zoom, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

The eligibility formula provides that those makeup artists and hairstylists (wig artists) who have been employed by the Employer in at least two productions for a total of five days over one year or at least 15 days over a two-year period shall be eligible to vote. The eligibility of one employee, Frandresha “Brie” Hall, has not been resolved, but she shall be permitted to vote subject to challenge.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work

locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **June 21, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. The Employer must also distribute the Notice of Election electronically to any employees in the unit with whom the Employer customarily communicates electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on Monday, June 28, 2021. If the Employer does not receive copies of the notice by Friday, June 25, 2021, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also,

if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: June 17, 2021



A handwritten signature in black ink, appearing to read "LH", with a long horizontal line extending to the right.

LISA Y. HENDERSON
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
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